ANALYSIS OF PROPOSED
CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment from America Online, Inc. ("AOL") and Time Warner Inc. (Time Warner") (collectively "Proposed Respondents") an Agreement Containing Consent Orders ("Proposed Consent Agreement"), including the Decision and Order ("Proposed Order"). The Proposed Respondents have also reviewed a draft complaint. The Commission has now issued the complaint and an Order to Hold Separate ("Hold Separate Order"). The Proposed Consent Agreement intends to remedy the likely anticompetitive effects arising from the merger of AOL and Time Warner.

II. The Parties and the Transaction

AOL is the world's leading internet service provider ("ISP"), providing access to the internet for consumers and businesses. AOL operates two ISPs: America Online, with more than 25 million members; and CompuServe, with more than 2.8 million members. AOL also owns several leading Internet products including AOL Instant Messenger, ICQ, Digital City, MapQuest, and MoviePhone; the AOL.com and Netscape.com portals; the Netscape 6, Netscape Navigator and Communicator browsers; and Spinner.com and NullSoft's Winamp, leaders in Internet music.

Time Warner is the nation's second largest cable television distributor, and one of the leading cable television network providers. Time Warner's cable systems pass approximately 20.9 million homes and serve approximately 12.6 million cable television subscribers, or approximately 20% of U.S. cable television households. Time Warner, or its principally owned subsidiaries, owns leading cable television networks, such as HBO, Cinemax, CNN, TNT, TBS Superstation, Turner Classic Movies and Cartoon Network.

Time Warner also owns, directly or through affiliated businesses, a wide conglomeration of entertainment or media businesses. Time Warner's holdings include leading magazine franchises, such as Time, People and Sports Illustrated; copyrighted music from many of the world'

On January 10, 2000, AOL and Time Warner entered into an Agreement and Plan of Merger (the "merger"), pursuant to which Time Warner common stockholders will receive 1.5 shares of the combined AOL Time Warner ("combined company," or "AOL Time Warner") for each share of Time Warner common stock they hold. AOL common stockholders will receive one share of common stock of AOL Time Warner for each share of AOL common stock they hold.

III. The Proposed Complaint

According to the complaint the Commission intends to issue, AOL's merger with Time Warner will have anticompetitive effects in three relevant product markets: (1) the market for broadband Internet access; (2) the market for residential broadband Internet transport services, or last mile access; and (3) the market for interactive television ("ITV") services.

AOL is the dominant narrowband ISP. Its narrowband customer base positions AOL to become a significant broadband ISP competitor as well. Time Warner provides broadband Internet access through Road Runner, a partially owned subsidiary in which it has a controlling interest. AOL and Road Runner are two of the most significant broadband ISP competitors in

IV. Terms of the Proposed Order

The Proposed Order is effective for a term of five years and resolves the Commission's antitrust concerns with the merger as discussed below.

A. Broadband Internet Access Services

Under the terms of the Proposed Order, before Time Warner can make AOL's broadband ISP service available in certain identified cable divisions representing over 70 percent of Time Warner's cable customers ("Identified Cable Divisions"),[1] Time Warner must first make available cable broadband service offered by Earthlink, Inc. pursuant to an agreement between Time Warner and Earthlink that the Commission has evaluated and approved.

In addition, Respondents cannot begin to advertise or promote AOL's broadband ISP service to subscribers in a cable division until Earthlink's competing ISP service is available to subscribers in that cable division or Earthlink advertises or promotes its service in that cable division, whichever occurs first. These provisions ensure that a competing ISP service, which is not affiliated with AOL Time Warner, is available to subscribers in most Time Warner cable areas at the same time that AOL introduces its cable broadband ISP service. It does not prevent Time Warner from conducting tests involving a limited number of subscribers that are purely for technological and operational implementation purposes, rather than for commercial purposes.

Within 90 days of making AOL's broadband ISP service available to subscribers, Time Warner must enter into agreements to carry at least two other non-affiliated broadband ISPs to provide cable broadband ISP services in the Identified Cable Divisions. The non-affiliated ISPs, and Time Warner's agreements with them, must receive the prior approval of the Commission. If Time Warner fails to enter into such agreements within this time period, the Commission may appoint a trustee who will have the authority to enter into such agreements on Time Warner's behalf. These agreements must also receive the prior approval of the Commission. These agreements must be on terms comparable to either the Earthlink agreement, or any agreement between AOL and another cable system to provide AOL's cable broadband ISP service over that cable system.[2]

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[1] The identified cable divisions to which this provision applies are: New York City, Tampa Bay, Central Florida, Houston, Raleigh/Fayetteville, Western Ohio, Northern Ohio, Charlotte, Los Angeles, Milwaukee, Greensboro, Hawaii, Cincinnati, San Antonio, Syracuse, Kansas City, South Carolina, Columbus, Rochester, Albany, and any other cable division with 300,000 subscribers or more that is controlled by Respondents.

[2] This provision applies to the following cable systems: Adelphia, AT&T, Cablevision, Charter, Comcast, and Cox.

In Time Warner's other cable divisions, Time Warner must enter into cable broadband ISP service agreements that have received the prior approval of the Commission with at least three other non-affiliated ISPs that have received the prior approval of the Commission within 90 days of making AOL's cable broadband ISP service available in each such division. If Time Warner fails to enter into such agreements within this time period, the Commission may appoint

- If requested by a non-affiliated ISP, Time Warner must provide the non-affiliated ISPs with the same point of connection within Time Warner's cable divisions that Time Warner provides to affiliated ISPs. This provision is intended to ensure that Time Warner may not discriminate against non-affiliated ISPs by providing them with a less-advantageous connection point to its network than it provides to AOL.

If any of the alternative cable broadband ISP service agreements approved by the Commission is for a term that terminates prior to expiration of the Proposed Order (*i.e.*, five years from the date the Proposed Order becomes final), the Proposed Order requires Time Warner to enter into an additional alternative cable broadband ISP service agreement with a non-affiliated ISP, subject to the Commission's approval, that must take effect immediately upon the expiration of the original agreement. If the original alternative cable broadband ISP service agreement is for a term of at least three years, Time Warner must offer the non-affiliated ISP that is a party to that agreement an option to renew the agreement for at least two years.

If Time Warner terminates any of the alternative cable broadband ISP service agreements approved by the Commission before the expiration of the Proposed Order, the Proposed Order requires Time Warner to enter into an additional alternative cable broadband ISP service agreement with a non-affiliated ISP, subject to the Commission's approval, which must take effect immediately upon the expiration of the original agreement.

If any non-affiliated ISP terminates its alternative cable broadband ISP service agreement approved by the Commission before the expiration of the Proposed Order, or if the non-affiliated ISP ceases to make its ISP service available to subscribers in a particular identified cable division, Time Warner must enter into an additional alternative cable broadband ISP service agreement with a non-affiliated ISP, subject to the Commission's approval, within 90 days after the original non-affiliated cable broadband ISP service is no longer available to subscribers.

In addition to the broadband ISP service agreements described above, the Proposed Order also requires Time Warner to negotiate and enter into arms' length, commercial agreements with any other non-affiliated ISP that seeks to provide cable broadband ISP service on Time Warner's cable system. Time Warner may decline to enter into such negotiations or agreements or impose rates, terms, or conditions based on cable broadband capacity constraints, other cable broadband technical limitations, or cable broadband business considerations, but only so long as it makes such determinations without discrimination on the basis of affiliation and not on the basis of the impact on Proposed Respondents' ISPs (including, but not limited to a decrease in subscribers of Proposed Respondents' ISPs).

The purpose of these provisions is to ensure that a full range of content and services from non-affiliated ISPs is available to subscribers; prevent discrimination by Proposed Respondents as to non-affiliated ISPs on the basis of affiliation, which would interfere with the ability of the broadband ISP service nor Road Runner is available.

D. Monitor Trustee Provisions

The Proposed Consent Order authorizes the Commission to appoint a Monitor Trustee to monitor compliance with the Order at any time after the Proposed Respondents sign the Consent Agreement. The Proposed Consent Order provides the Monitor Trustee with the power and authority to monitor the Proposed Respondents' compliance with the terms of the Proposed Consent Order, and full and complete access to personnel, books, records, documents, and facilities of the Proposed Respondents to fulfill that responsibility. In addition, the Monitor Trustee may request any other relevant information that relate to the Proposed Respondents' obligations under the Proposed Consent Order. The Proposed Consent Order precludes Proposed Respondents from taking any action to interfere with or impede the Monitor Trustee's ability to perform his or her responsibilities or to monitor compliance with the Proposed Consent Order.

The Monitor Trustee may hire such consultants, accountants, attorneys, and other assistants as are reasonably necessary to carry out the Monitor Trustee's duties and responsibilities. The Proposed Consent Order requires the Proposed Respondents to bear the cost and expense of hiring these assistants.

E. Trustee Provisions

The Proposed Consent Order provides that the Commission may appoint a trustee to enter into broadband agreements with non-affiliated ISPs in two instances. First, if the Proposed Respondents have failed to enter into agreements with two additional ISPs in the Identified Cable Divisions within 90 days of making an affiliated ISP available to subscribers, the Commission may appoint a trustee to enter into an agreements, subject to the prior approval of the Commission. The trustee shall, for an additional 90 days, offer to enter into agreements with non-affiliated ISPs that are comparable, taken as a whole, to (1) the Earthlink agreement; or (2) any broadband agreement AOL enters into with any other cable system operator. The trustee's obligation is to ensure that at least two non-affiliated ISPs are available on the Time Warner system in these divisions in addition to Earthlink.

The Commission may also appoint a trustee to enter into agreements in other Time Warner cable divisions if the Proposed Respondents fail to enter into agreements with at least three non-affiliated ISPs that the Commission approves within 90 days of making any affiliated ISP available. The trustee shall, for an additional 90 days, offer to enter into agreements with non-affiliated ISPs that are comparable, taken as a whole, to (1) any other broadband agreement with a non-affiliated ISP for carriage on any Time Warner cable system; or (2) any broadband agreement AOL enters into with any other cable system operator. The trustee's obligation is to ensure that at least three non-affiliated ISPs are available on the Time Warner cable systems in these divisions.

F. Order to Hold Separate

In addition to the Proposed Order, the Commission also issued an Order to Hold Separate ("Hold Separate Order"). The purpose of the Hold Separate Order is to prevent interim harm to competition and to prevent AOL from gaining a competitive first mover advantage through a relationship with Road Runner.

The Hold Separate Order requires the Proposed Respondents to hold AOL and Road Runner separate in each Identified Cable Division until they have made an affiliated ISP available to broadband customers in that Identified Cable Division. The Hold Separate Order expressly prohibits AOL and Road Runner from, among other things, cross or joint promotional activities, joint or cooperative advertising, and any steps to benefit, directly or indirectly, from each other's business activities.

The Commission may appoint a trustee to monitor compliance with the terms of the Hold Separate Order.

V. Opportunity for Public Comment

The Proposed Consent Agreement has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the Proposed Consent Agreement and the comments received and will decide whether or not to make the Proposed Order final.

By accepting the Proposed Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the Proposed Consent Agreement, to aid the Commission in its determination of whether it should make final the Proposed Order contained in the agreement. This analysis is not intended to constitute an official interpretation of the Proposed Order, nor is it intended to modify the terms of the Proposed Order in any way.